ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

Jason D. Oxman
General Counsel

22 February 2005

Jeffrey Carlisle
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Implementation of Triennial Review Remand Order, WCB Docket No. 04-313

Dear Mr. Carlisle:

On February 18, 2005, in response to a letter from you dated February 4, 2005, the four Bell Operating Companies (BOCs) provided to the Bureau a list of wire centers they believe meet the various impairment test thresholds related to loops and transport set out in the Federal Communications Commission's *Triennial Review Remand Order* (TRRO).[1] Rather than simply respond to the Bureau's informational request in those letters, the Bell companies attempt to bypass the clear bilateral process established in the Commission's *Triennial Review Remand Order* for the implementation of the new unbundling regime. Specifically, BellSouth, Verizon, and Qwest, in their letters to you, each clearly state their intent to disregard the Commission's new rules and replace them with their own regime – one that flouts the Commission's requirement to maintain an orderly implementation process.[2] Although the Bell company central office lists are helpful tools as interconnection agreement negotiations get underway, the Bells clearly intend the lists to preempt such negotiations, not facilitate them.[3] The Association for

[1] *See* Letter from Bennett L. Ross, General Counsel – DC, BellSouth Corp., to Jeffrey Carlisle, Chief, Wireline Competition Bureau, FCC (Feb. 18, 2005); Letter from Susanne A. Guyer, Senior Vice President, Federal Regulatory Affairs, Verizon to Jeffrey Carlisle, Chief, Wireline Competition Bureau, FCC (Feb. 18, 2005); Letter from Gary Lytle, Senior Vice President, Federal Relations, Qwest, to Jeffrey Carlisle, Chief, Wireline Competition Bureau, FCC (Feb. 18, 2005); Letter from Jim Smith, Senior Vice President – FCC, SBC Services, Inc., to Jeffrey Carlisle, Chief, Wireline Competition Bureau, FCC (Feb. 18, 2005).

[2] SBC avoids divulging its legal strategy in its letter to the Bureau, but discloses it instead in an accessible letter sent directly to CLECs. *See infra* n. 12.

[3] Although beyond the scope of this letter, ALTS notes that it member companies vigorously dispute the methodology used by the Bells to calculate business access lines and fiber collocators, to the extent such methodology can be discerned from the glimmer of information provided by the Bells in their February 18 letters to the Bureau.

Local Telecommunications Services (ALTS)[4] writes to urge you to clearly and quickly repudiate the Bell company threats that have been made regarding their intended actions. Failure to do so would be taken as an express endorsement of these blatant violations of the Commission's rules – which is likely the Bells' goal in sending the letters.[5]

In the *Triennial Review Remand Order*, the Commission adopted new rules to implement the unbundling provisions of section 251(c)(3) of the Act.[6] The Commission set an effective date of March 11, 2005, for its new unbundling rules, in order to replace the interim transitional regime before it expired.[7] Notwithstanding the accelerated effective date for the Commission's new unbundling rules, the Commission reiterated the process by which its rules would be implemented in the marketplace:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order.[8]

The Commission's holding merely echoes the language of section 252 of the Act, which requires requesting carriers and incumbents to negotiate the specific terms and conditions

---

[4] On February 10, 2005, ALTS and Comptel/ASCENT announced membership approval of a merger of the two associations into a unified voice for the competitive communications industry. The merger of ALTS and Comptel/ASCENT will become effective on March 1, 2005.

[5] For example, BellSouth states: "BellSouth believes that its determinations concerning the wire centers in which the Commission's nonimpairment thresholds for high-capacity loops, transport and dark fiber are completely consistent with the Commission's revised rules. . . . . BellSouth will assume the Commission agrees unless the Commission advises otherwise." BellSouth Ross Letter at 3. Thus, inaction is not an option – unless the Commission wishes to endorse in its entirety BellSouth's list of affected central offices, the FCC must respond to BellSouth's letter, and those of the other Bell companies, making clear that the lists provided to the FCC are a start to the process of negotiating interconnection agreement modifications, not the end of that process. In an accessible letter to its CLEC wholesale customers, BellSouth clearly stated that if the FCC took no action to stop it from doing so, it would unilaterally cease providing high-capacity loops and transport UNEs in any central office it wished as of March 11, 2005. *See* BellSouth Carrier Notification SN91085039, dated Feb. 11, 2005, at 2 ("The FCC clearly intended the provisions of the TRRO related to "new adds" to be self-effectuating. . . . . Consequently, in order to have any meaning, the TRRO's provisions regarding "new adds" must be effective March 11, 2005, without the necessity of formal amendment to any existing interconnection agreements.")

[6] 47 U.S.C. § 251(c)(3).

[7] *See Interim Order and NPRM*, 19 FCC Rcd 16783, 16794, para. 21. Importantly, the Commission adopted a specific effective date for its new unbundling rules for one simple reason: avoiding what it termed a "gap between the expiration of the interim unbundling requirements and the effective date of the rules." *Triennial Review Remand Order* at ¶ 236. The Commission recognized that, if it left the default effective date (30 days after publication in the Federal Register) in place, it would unnecessarily create a period "during which the previously adopted transitional requirements would be effective for a short period of time." *Id.* Thus, in order to "to avoid regulatory confusion and industry disruption arising from the delayed applicability of newly adopted rules," the Commission established March 11, 2005, as a date certain for effectiveness of its new rules. Put another way, the March 11, 2005, effective date was designed to prevent the disruption that would result from operation of two different interim rule regimes, and was not designed – as the Bells appear to believe – to allow incumbents to bypass the interconnection agreement negotiation process required by statute and the Commission's rules.

[8] *Triennial Review Remand Order* at ¶ 233.

of access to, *inter alia*, unbundled network elements required by the FCC's rules.[9] Thus, the Commission's direction to carriers to implement the rule changes adopted in the *TRRO* in existing interconnection agreements is a reaffirmation of the clear statutory obligation to negotiate in good faith to implement changes to unbundling rules.[10]

But the Commission did not merely restate this clear statutory obligation. The Commission recognized that the Bell companies might attempt to avoid the statutory implementation process in favor of a unilateral self-help approach, and took concrete steps to prevent that from happening. In order to prevent the Bell companies from unilaterally implementing the loop and transport unbundling rule changes, the Commission specifically required the incumbent carriers to continue providing loop and transport network elements during the pendency of interconnection agreement negotiations to implement the *Triennial Review Remand Order*.

> We therefore hold that to submit an order to obtain a high-capacity loop or transport UNE, a requesting carrier must undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of its knowledge, its request is consistent with the requirements discussed in parts IV, V, and VI above and that it is therefore entitled to unbundled access to the particular network elements sought pursuant to section 251(c)(3). Upon receiving a request for access to a dedicated transport or high-capacity loop UNE that indicates that the UNE meets the relevant factual criteria discussed in sections V and VI above, the incumbent LEC must immediately process the request. To the extent that an incumbent LEC seeks to challenge any such UNEs, it subsequently can raise that issue through the dispute resolution procedures provided for in its interconnection agreements. In other words, the incumbent LEC must provision the UNE and subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority.[11]

---

[9] 47 U.S.C. § 252. By stating a clear intention to refuse to negotiate implementation of the Commission's unbundling regime, the Bell companies are in clear violation of the good faith negotiation requirement of the Act and the Commission's rules. *See, e.g.*, 47 U.S.C. § 252(b)(5) ("The refusal of any party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.").

[10] The Commission recognized that disputes would arise between incumbents and competitive carriers over the methodology used to count business access lines and collocated carriers pursuant to the Commission's revised impairment tests. Those concerns are validated by the Bell company letters to the Bureau cited *supra.* For example, Qwest states, as to the compilation of business access lines, that "Qwest does not track UNE-P separately by residential and business. Qwest derived an estimate of business UNE-P lines in each wire center based on the percentage of white page listings for that wire center that are business, rather than residential. All of these data are current as of December 2003." Qwest Lytle Letter at 2. This is Qwest's theory of implementation, and it is but one representative example of the questionable counting methodologies employed by the Bell companies in their letters to the Bureau. Obviously, competitive carriers would dispute Qwest's choice of calculating methodology, and at minimum the Commission must recognize that such a dispute would be negotiated, or perhaps arbitrated pursuant to section 252 of the Act. It would not be unilaterally resolved by Qwest.

[11] *Triennial Review Remand Order* at ¶ 234. *Cf.* Qwest Lytle Letter at 2 ("To the extent this submission, or similar submissions by other incumbents, raise any questions or disputes, those issues should be addressed by the Commission, rather than state commissions.").

Interconnection agreement negotiations to implement the new unbundling rules will begin after the *TRRO* effective date of March 11, 2005, and thus this Commission holding applies from March 11 until the date of completion of interconnection agreement modifications.

The Bell company responses to the Bureau's information request prove that the Commission's concerns about Bell self-help were valid. The Bells now take the public position that they alone determine where unbundled loops and transport are available, notwithstanding the clear holding in the *TRRO* that the Bells may not unilaterally determine which central offices can be shut off to requesting carriers, and notwithstanding the Bureau's reiteration that interconnection agreement modifications are necessary before the loop and transport tests adopted in the *TRRO* can be implemented. For example, BellSouth states that it provided its letter to the Bureau "so that all requesting carriers will be aware of the particular wire centers in which the nonimpairment thresholds have been met and in or between which new high capacity loops and transport will no longer be available on an unbundled basis as of March 11, 2005."[12] As BellSouth further explained in its carrier notification letter sent to CLECs on February 11, 2005, "the FCC's actions clearly constitute a generic self-effectuating change for all interconnection agreements with regard to "new adds" for these former UNEs."[13] In this and other letters, the Bell companies have informed the FCC that they refuse to negotiate interconnection agreement provisions with CLECs to implement the *TRRO*.

The Commission clearly held in the *TRRO* that, while interconnection agreement negotiations are underway to implement the new UNE rules, the Bells must "provision first and dispute later" any UNE orders submitted by a self-certifying CLEC.[14] Indeed, in the Bureau's letter to the four Bell companies asking for a list of central offices they believe meet the Commission's newly adopted impairment test, the Bureau reiterated the Commission's goal of ensuring "the timely incorporation of the Triennial Review Remand Order's fact-dependent rules into revised interconnection agreements."[15] The letter further states the Bureau's belief that the provision of such information will "expedite the implementation of the Commission's rules implementing the Act."[16] In short, the list provided by the Bells is, in the Bureau's and Commission's view, the

---

[12] BellSouth Ross Letter at 2. *See also* Verizon Guyer Letter at 1 (stating that "as of March 11, 2005, new high-capacity UNEs will no longer be available at the wire centers listed in the attachment for elements excluded under the terms of the Order."). Even where Bell companies were wise enough to avoid exposing unlawful behavior to the FCC, they have communicated their intent to ignore the FCC's rules in direct communications with competitive carriers. *See, e.g.*, SBC Accessible Letter CLECALL05-019, SBC's Implementation of the FCC TRO Remand Order for Unbundled High-Capacity Loops and Unbundled Dedicated Transport – Order Rejection ,dated Feb. 11, 2005 ("The effect of the TRO Remand Order on New, Migration or Move LSRs for these affected elements is operative notwithstanding interconnection agreements or applicable tariffs.").

[13] BellSouth Carrier Notification SN91085039, dated Feb. 11, 2005, at 2.

[14] *TRRO* at ¶ 234.

[15] Letter from Jeffrey Carlisle, Chief, Wireline Competition Bureau, FCC, to Herschel L. Abbott, Jr., Vice President – Governmental Affairs, BellSouth Corp. (Feb. 4, 2005).

[16] *Id.*

beginning of the process of implementing the *TRRO*, and not, as the Bells would have it, the end of that process.

Notwithstanding the Commission's clear statement that the Bell companies must provision any UNE request accompanied by a self-certification from the requesting carrier, after which time the "incumbent LEC [may] subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority," the Bells now claim the ability to rewrite the rules.[17] BellSouth, for example, rejects the Commission's *TRRO* formulation of self-certification by requesting carriers, deciding instead that, because BellSouth has provided its list of offices it believes are shut off to CLECs, "a carrier that subsequently requests new high-capacity loops and transport on an unbundled basis in or between these affected wire centers will be unable self-certify based on a "reasonably diligent inquiry" that its request is consistent with the Commission's unbundling requirements, as required by the *Triennial Review Remand Order*."[18] In other words, BellSouth claims that it has done the CLEC's diligent inquiry for it, and thus it is BellSouth's unilateral interpretation of the Commission's new unbundling rules that will govern CLEC access to loops and transport, not (as the Commission clearly held) a negotiated interconnection agreement. The Commission's rules require the exact opposite process: while negotiations are underway to implement the *TRRO,* CLECs are entitled to UNE access in those disputed central offices after a good faith inquiry establishing that right. The Bell company letters to the Bureau, typified by BellSouth's letter, are not only stark evidence of an anticipatory breach of Bell company interconnection agreements; they are a bold assertion of authority to ignore the Commission's rules.

The Commission must recognize that, given the current spate of merger transactions in the telecommunications industry, competitive carriers are facing unprecedented challenges. Although the Bells may successfully absorb former competitors, the open question is whether the FCC will vigorously enforce its rules to ensure that the Bell companies cannot violate the law in their quest to squelch competition. The Commission must recognize that further clarification of the exact methodology for counting business access lines and fiber collocators is urgently needed.[19] Moreover, because BellSouth in particular has informed the Commission that, unless the Commission "advises otherwise," it will assume the FCC has fully endorsed BellSouth's wire center list, further immediate action is needed. At minimum, the Commission must issue a public notice reminding incumbent LECs that, pursuant to the *TRRO*, they are

[17] *Triennial Review Remand Order* at ¶ 234.
[18] BellSouth Ross Letter at 2.
[19] It is particularly important for the Commission to recognize that the accuracy of the Bell company data it relied on in the *TRRO* to develop its loop and transport tests has been brought into question by the most recent Bell submissions. For example, Verizon notes in its February 18 letter that it has now "amended its count" of fiber collocators first submitted to the Commission on December 4, 2004, and relied upon by the Commission in the *TRRO*. See Verizon Guyer Letter at 2. *See also* SBC Smith Letter at 2 ("SBC's December 7 and December 10, 2004 filings used different criteria . . . ."). At minimum, the Commission must conclude that the new Bell company access line and collocator data cannot be, as the Bells would have it, the final word on impairment, given the wide disparity between the Bell data relied upon in the *TRRO* and the new data submitted by the Bells in their February 18, 2005, letters to the Bureau.

required to continue providing UNEs to self-certifying carriers until such time as the Commission's new unbundling regime has been fully implemented through the provisions of section 252 of the Act.

Please do not hesitate to contact me if I can provide any additional information. Thank you in advance for your attention to this important matter.

Respectfully submitted,

/s/

Jason Oxman
General Counsel
Association for Local Telecommunications Services
888 17th St., NW
12th Floor
Washington, DC 20006